Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, ETC., ET AL., PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 25, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,309)

(35,309)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, Former Administratrix of the Estate of Solomon Klein, Deceased, and Also Individually; AMY K. EISENDRATH, BERNICE K. FRIEDLANDER, and LAWRENCE KLEIN, Petitioners,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Benjamin B. Pettus, on behalf of the above named petitioners, prays that a writ of certiorari be issued to review the judgment of the Court of Claims in the above case entered June 2, 1930 (not yet reported).

Statement

Solomon Klein, a resident of the State of Illinois, died intestate on September 17, 1919, and his wife, Etta M. Klein, became the administratrix of his estate. She and the other petitioners who are respectively daughters and son of deceased, are his sole surviving heirs at law and next of kin and distributees of his estate.

On July 1, 1918, Solomon Klein conveyed to his wife, the said Etta M. Klein, two parcels of real estate in Cook County, Illinois, by deed providing so far as material here as follows:

[fol. 2] "First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever."

The Commissioner of Internal Revenue held that the aforementioned property should be included in the gross estate of decedent as a transfer to take effect in possession or enjoyment at or after decedent's death within the meaning of section 402 (c) of the Revenue Act of 1918 (C. 18, 40 Stat. 1057, 1097). There was assessed against the estate on this account the sum of $23,387.51 which was paid by the estate on January 21, 1924. It was stipulated by the parties hereto that the conveyance was not in contemplation of death within the meaning of the statute.

The administratrix duly filed a claim for refund of said amount, contending that as possession and enjoyment of the property so conveyed was not deferred until decedent's death, no part of the value thereof should be included for tax purposes. On August 24, 1927, the Commissioner allowed the claim in part and rejected it to the extent of $13,705.92 and interest thereon of $1,126.51, on the ground that the last mentioned amounts represented the tax and interest due as the result of the inclusion as a part of the decedent's gross estate of the aforementioned parcels of real estate after having deducted the value of the life estate of Etta M. Klein. The administration having been closed, the petitioners as sole distributees of the estate, brought suit in the Court of Claims, (R. 1) to recover the amount [fol. 3] of $13,705.92 and $1,126.51 interest paid thereon on the grounds (1) that no part of the conveyance made by Solomon Klein to his wife constituted an interest to decedent for the purpose of inclusion in his gross estate within the meaning of the estate tax law, and (2) that section 402 (c) of the Revenue Act of 1918, so far as it affected the gift in question, was unconstitutional. The Court of Claims rendered judgment for the respondent on June 2, 1930.

Statutes Involved

Section 401 of the Revenue Act of 1918 (C. 18, 40 Stat. 1057, 1096) provides as follows:

"That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *"

Section 402 of the same Act (40 Stat. 1097) provides as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act). * * *"

Questions Presented

1. Whether section 402 of the Revenue Act of 1918 requires that there shall be included as part of the decedent's estate the value of property which had been conveyed to [fol. 4] his wife for life and in fee simple conditioned upon her surviving him with the provision in the deed for a reversion to the grantor in the case of his surviving the grantee.

2. If so, whether Congress has the power to require the inclusion of the value of such property in the computation of decedent's gross estate for estate tax purposes where the transfer was complete and irrevocable prior to the enactment of the taxing statute.

Assignment of Errors

1. The Court of Claims erred in holding that the decedent had an interest in the property, the transfer of which interest took effect and was complete at his death.

2. The Court of Claims erred in holding that the Revenue Act of 1918 which was passed subsequent to the transfer was not unconstitutional and retroactive so far as it attempted to tax the transfer here involved.

3. The Court of Claims erred in giving judgment for the respondent.

Reasons for the Allowance of the Writ

1. Because the case involves an important question of federal tax law which has not been but which should be settled by this Court.

2. Because the provisions of the Revenue Act of 1918, the unconstitutionality of which is involved in this case, are contained in corresponding sections of subsequent Revenue Acts.

3. Because the decision of the Court of Claims in this case is in conflict with a rule of property which is settled by the laws of the State of Illinois of which decedent was a citizen at the time of his death and where the property which is the subject of the tax is located.

[fol. 5] 4. Because the decision of the Court of Claims is inconsistent with the decisions of this Court in the cases of Chase National Bank v. United States, 278 U. S. 327, Reinecke v. Northern Trust Co., 278 U. S. 339, and Nichols v. Coolidge, 274 U. S. 531, and is founded upon an erroneous interpretation of these decisions and is utterly inconsistent with the decision of this Court in the case of May v. Heiner, 281 U. S. 238.

Wherefore it is respectfully submitted that this petition should be granted.

Etta M. Klein (Former Administratrix of the Estate of Solomon Klein, Deceased), Amy K. Eisendrath, Bernice K. Friedlander, Lawrence Klein, by Benjamin B. Pettus, Counsel for Petitioners. Edward Clifford, Colladay, Clifford & Pettus, of Counsel.

[fol. a]

IN COURT OF CLAIMS OF THE UNITED STATES

No. J-124.

ETTA M. KLEIN, Former Administratrix of the Estate of Solomon Klein, Deceased, and Also Individually; Amy K. Eisendrath, Bernice K. Freidlander, and Lawrence Klein

vs.

THE UNITED STATES

No. J-124

[fol. 1] I. HISTORY OF CASE

On March 19, 1928 plaintiffs filed their petition.
On April 28, 1928 defendant filed General traverse.
On December 4, 1929 the case was argued and submitted.
On June 2, 1930 the court filed findings of fact, conclusion of law and opinion.

[fol. 2] IN COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

II. PETITION—Filed March 19, 1928

To the Honorable the Court of Claims:

The plaintiffs respectfully represent:

I

The plaintiff, Etta M. Klein, brings this suit as the former administratrix of the estate of her deceased husband, Solomon Klein, intestate, and also in her individual capacity as surviving widow and a distributee of his estate. [fol. 3] Plaintiffs Amy K. Eisendrath, Bernice K. Friedlander and Lawrence Klein, bring this suit as the children and sole surviving heirs at law and next of kin of said Solomon Klein, deceased, and constitute with said Etta M. Klein, the sole distributees of the estate of Solomon Klein, deceased.

II

That Solomon Klein died intestate on September 17, 1919, being a citizen of the United States and a resident of the City of Chicago and State of Illinois. The plaintiff Etta M. Klein was on September 29, 1919, appointed as administratrix of his estate by order of the Probate Court of Cook County, Illinois, in Administration Cause No. 28,-660, and duly qualified and acted as such administratrix.

Thereafter as provided by the Revenue Act of 1918, the plaintiff, as administratrix of his estate, duly made and filed with the Collector of Internal Revenue for the First District of Illinois, an estate tax return for the estate of Solomon Klein, deceased, wherein the estate tax liability of said estate was indicated to be the sum of $30,305.05, which sum was paid on January 21, 1924.

Thereafter the Commissioner of Internal Revenue notified the said administratrix in writing that upon an audit of said return as the result of an investigation thereof, the estate tax liability of said estate was $67,397.56, and that the additional tax due by the estate was $37,092.51. Subsequently the Commissioner notified the said administratrix that said additional tax was reduced to the sum of [fol. 4] $23,387.51, which amount the said administratrix paid to the said Collector of Internal Revenue, together with interest thereon in the amount of $1,922.25 on January 21, 1924.

Thereafter on October 14, 1927, the said Commissioner of Internal Revenue refunded to the said administratrix and the other plaintiffs herein, in equal portions, the sum of $10,477.33 as tax over-paid, and $2,330.81 as interest on same as a result of a claim for refund therefor filed as provided by law.

The total amount of estate taxes upon the estate of said decedent which has been paid as aforesaid exclusive of amount refunded is $52,315.97, which amount has been covered into the Treasury of the United States and which the said Commissioner of Internal Revenue on August 24, 1927, finally determined to be the estate tax liability of said estate.

III

In arriving at the estate tax liability of said decedent in the sum of $52,315.97, the said Commissioner of Internal

Revenue determined the value of the gross estate of said decedent to be $1,179,493.45, the deductions allowable under the Revenue Act of 1918 to be $171,333.71, and the net estate upon which this aforesaid tax was imposed to be the sum of $1,008,159.74, which said net estate was found by deducting from the value of the gross estate the deductions allowed as aforesaid.

IV

[fol. 5] The Revenue Act of 1918 provides as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *"

The said Commissioner of Internal Revenue in computing the value of the gross estate of the said decedent improperly, erroneously and unlawfully included therein as being the interest therein of the decedent at the time of his death, which after the payment of the charges against the estate and the expenses of the administratrix was subject to distribution as part of his estate, a portion of the value of certain real estate conveyed by said decedent on July 1, 1918, to his wife, Mrs. Etta M. Klein. Said real [fol. 6] estate consisted of two parcels designated as lots 22, 23 and 24, Block 1, Baron's Subdivision of Brand's Addition to Chicago, Illinois, and lots 3, 4, 30 and 31 in Walsh's Subdivision of Block 16, in Walsh & McMullen's Subdivision of S ¾ of SE ¼ of Section 20, Township 39 N, Range 14 E, Cook County, Illinois, and the improvements

thereon. The deed of conveyance thereof to Mrs. Etta M. Klein provided in part as follows:

"First: To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have and hold the said lands in fee simple, unto the sole use of herself, her heirs and assigns forever."

The Commissioner of Internal Revenue has determined that the transfer to the plaintiff Etta M. Klein of the above [fol. 7] mentioned property was not a transfer in contemplation of death, but he has held that the value of said property, less the value of the life estate conferred upon the plaintiff Etta M. Klein, was subject to be included in the gross estate of the decedent for the purpose of estate taxes, and that such last mentioned value constituted a transfer of property "intended to take effect in possession or enjoyment at or after his death" within the meaning of section 402 (c) of the Revenue Act of 1918.

The plaintiffs are advised and believe and therefore aver that the provision of said act in so far as it requires that there shall be included in the gross estate the value of property transferred by decedent prior to its passage merely because the conveyance was intended to take effect in possession and enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation and therefore is unconstitutional. The plaintiffs are further advised and believe that no part of the aforesaid conveyance constituted any interest of the decedent for the purpose of inclusion in his gross estate within the meaning of the Estate Tax law for the reason that no part of the value thereof at the time of his death was subject to the payment of charges against the estate, nor the expenses of its administration,

nor was it subject to distribution as part of his estate, and had such amount been excluded from decedent's gross estate, the value of the net estate would have been the sum of $913,975.63, and plaintiffs aver that the value of the net estate of the decedent was not in excess of the value of said [fol. 8] sum of $913,975.63, and that the estate tax thereupon is the sum of $37,483.54, being $14,832.43 less than the tax liability of the estate as found by said Commissioner of Internal Revenue, and that said sum, together with interest paid thereon in the sum of $1,126.51 should be refunded.

V

Plaintiff Etta M. Klein avers that she was discharged as administratrix of the estate of said decedent on the 7th day of December, 1920, and by order of the Probate Court of Cook County, Illinois, passed that date, her final report as said administratrix, showing the distribution of the balance of the estate of Solomon Klein, deceased, to the plaintiffs herein in accordance with statute, was duly approved.

VI

Plaintiff Etta M. Klein further avers that on or about the 10th day of June, 1927, she duly made and filed with the said Commissioner of Internal Revenue a claim for refund of estate taxes overpaid in the amount of $23,357.51 and of interest overpaid in the amount of $1,922.25, or such greater amount as is legally refundable on account of the said taxes and interest theretofore paid by her as administratrix as aforesaid, and the said plaintiff avers that the said Commissioner of Internal Revenue on August 24, 1927, did reject the said claim for refund in the amount of $14,832.43 taxes and $1,126,51 interest; that subsequently she [fols. 9 & 10] filed a request for reconsideration of said rejected claim and under date of December 21, 1927, the said Commissioner of Internal Revenue affirmed his said rejection of the aforesaid claim for refund and declined to reopen said claim.

VII

No other action has been had on said claim in Congress or any of the executive departments of the Government;

no person other than the plaintiffs herein are the owners thereof or interested therein; no assignment or transfer of this claim or any part thereof or interest therein has been made; the plaintiffs are justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets; and the plaintiffs have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. The plaintiffs are citizens of the United States and claim the sum of $15,958.94, being the sum of $14,832.43 taxes and $1,126.51 interest paid thereon, with interest on the aggregate sum from January 21, 1924.

Edward Clifford, B. B. Pettus, Attorneys of Record.
Colladay, Clifford & Pettus, of Counsel, 710 Union Trust Building, Washington, D. C.

Duly sworn to by Etta M. Klein, et al. Jurat omitted in printing.

[fol. 11] III. General Traverse—Filed April 28, 1928

Now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

IV. Argument and Submission

On December 4, 1929, this case was argued and submitted on merits by Mr. Benjamin B. Pettus for plaintiff and Mr. Fred K. Dyar for defendant.

[fol. 12] V. **Findings of Fact, Conclusion of Law, and Opinion, Littleton, J.**—Entered June 2, 1930

Mr. Benjamin B. Pettus for the plaintiffs.

Mr. Edward Clifford and Colladay, Clifford & Pettus were on brief.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant.

Mr. W. T. Sabine was on brief.

This is an action to recover $13,705.92, additional estate tax, and $1,1[illegible]51, interest, paid upon the estate of Solomon Klein, deceased, together with interest on the total amount from January 21, 1924.

The question is whether under a conveyance of certain property in July, 1918, the decedent made a transfer of an interest to take effect in possession or enjoyment at or after his death which occurred in September, 1919, and, if so, whether the provision of the revenue act of 1918, which requires the inclusion in the gross estate of the value of this interest, is constitutional.

Special Findings of Fact

1. Etta M. Klein is the widow and Amy K. Eisendrath, Bernice K. Friedlander, and Lawrence Klein are daughters and son, respectively, of Solomon Klein, a citizen and resident of Chicago, Illinois, who died intestate September 17, 1919. Plaintiffs are the surviving heirs at law and next of kin of the decedent and the sole distributees of his estate. The widow was appointed administratrix of decedent's estate September 29, 1919, and duly qualified and acted in that capacity until December 7, 1920, when her final report showing the distribution of the balance of the estate to the plainiffs herein was approved and she was discharged.

2. Within the time provided by the revenue act of 1918, the administratrix filed returns for the estate of decedent showing a total tax of $30,305.05 which was duly paid. Thereafter the Commissioner of Internal Revenue notified her in writing that upon an audit of the return as a [fol. 13] result of an investigation thereof, the total tax liability of the estate was $67,397.56, and that an additional estate tax of $37,092.51 was due. Subsequently the commissioner reduced the amount of additional tax to $31,692.51. The administratrix paid $8,305 on March 8, 1923, and the balance of $23,387.51, together with interest in the amount

of $1,922.25, was paid January 21, 1924. The additional tax to the extent of $23,387.51 resulted from the inclusion in the gross estate of the decedent of the value of certain parcels of real estate described in a deed hereinafter referred to from decedent to his wife, Etta M. Klein, dated July 1, 1918, the commissioner holding that the entire value of the property included in the deed constituted a part of decedent's gross estate as a transfer to take effect in possession or enjoyment at or after the decendent's death within the meaning of section 402 (c) of the revenue act of 1918. It is agreed by all of the parties that the conveyance was not in contemplation of death within the meaning of the statute.

3. The property, the value of which the Commissioner of Internal Revenue included in decedent's gross estate, consisted of two parcels of improved real estate in Cook County, Illinois, and the conveyance from the decedent to his wife, Etta M. Klein, on July 1, 1918, so far as material here, was as follows:

"First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

"Said grantee covenants with said grantor that she will during the lifetime of said grantor promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either

of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other."

4. June 10, 1927, the administratrix filed a claim for refund of $23,387,51, tax, and $1,922.25, interest paid, with interest on the aggregate sum from January 21, 1924, on the ground that possession and enjoyment to the grantee of the property conveyed by the decedent were not deferred until decedent's death and accordingly no part thereof should be included in the gross estate. Subsequently on August 24, 1927, the commissioner allowed the claim in part [fol. 14] and rejected it to the extent of $13,705.92 and interest thereon of $1,126.51, on the ground that the last-mentioned amounts represented the tax and interest due as the result of the inclusion as a part of the decedent's gross estate of the aforementioned parcels of real estate, after having deducted the value of the life estate of Etta M. Klein.

5. October 14, 1927, the commissioner refunded to the plaintiffs herein in equal proportions the amount of $10,477.33 as tax overpaid and $2,330.81 as interest thereon in accordance with the ruling made on the claim for refund. Plaintiffs made application for reconsideration of the commissioner's decision, which application was denied December 21, 1927.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover, and their petition is therefore dismissed.

Judgment is rendered against plaintiffs for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him.

OPINION

LITTLETON, Judge, delivered the opinion of the court:

Plaintiffs contend, first, that under section 402 (c) of the revenue act of 1918, 40 Stat. 1097, Solomon Klein at the time of his death had no interest in the property in question which took effect in possession or enjoyment at or after that event; that the deed of conveyance transferred to his wife title to the lands in fee simple; that the conveyance was complete and irrevocable; and that the grantor retained no beneficial interest in the property conveyed but only a possibility of an interest through reversion; secondly, that if the decedent had an interest in the property at death, the same was not taxable, for under Nichols v. Coolidge, 274 U. S. 531, the revenue act of 1918 is unconstitutional in so far as it undertakes to tax transfers made before its passage.

By the terms of the deed here under consideration the decedent, until his death, had a vested reversion in fee to the property described subject only to the life estate therein provided for his wife, and to the possibility of its being divested by his death during her lifetime. The grantee had no more than a life estate in the property with a contingent remainder, which remainder was based upon a condition precedent, i. e., the death of her husband during her lifetime. Prior to the grantor's death the grantee did not and could not have a vested estate in remainder. Under the deed in question the possession or enjoyment of the rights and benefits of ownership of this remainder in the grantor could in no event be hers until her husband's death; the deed therefore to the extent of the value of this remainder interest reserved was a transfer intended to take effect in possession or enjoyment at the decedent's death within the meaning of section 402 (c) of the revenue act of 1918. The deed here in question was not an absolute conveyance forever in fee simple by the husband with a mere possibility of reverter but was a deed which expressly reserved and accepted the reversion and conveyed only a life estate to the [fol. 15] wife with a contingent remainder, upon a condition precedent, i. e., the decedent's death during her lifetime. It is clear that it was the intent of the decedent, ex-

pressed in unambiguous language in the deed, that his wife should have only a life estate in the property during his lifetime and that only in case of his death during her lifetime should she have a remainder in fee in the land therein described. It appears to be well settled by the law of Illinois that such a condition precedent creates only a contingent remainder under the laws of that State. Bayley v. Strahan, 314 Ill. 213, 145 N. E. 359; Wood v. Chase, 327 Ill. 91, 158 N. E. 470; Meldahl v. Wallace, 270 Ill. 220, 110 N. E. 354; Golladay v. Knock, 235 Ill. 412, 85 N. E. 649; Haward v. Peabody, 128 Ill. 430, 21 N. E. 503.

The Commissioner of Internal Revenue included in the decedent's gross estate the value of his reversionary interest determined by deducting from the value of the property described in the deed, the value of the life estate of Etta M. Klein, as the interest of the decedent in the property which, under the deed, constituted a transfer and which took effect and passed to the wife in possession and enjoyment at his death. In this we think the commissioner was correct. The interest of which the decedent made a transfer intended to take effect in possession or enjoyment at his death was his entire vested reversion of the remainder in the property described in the deed. Until his death, however, the transfer was incomplete. Until that time the whole legal title to the fee, subject only to his wife's life estate, was vested in him as well as his vested remainder in fee of the entire reversionary interest. Until his death the possession or enjoyment by the decedent's wife of his vested remainder in fee was postponed. The decedent's death was the event which made the transfer complete and effective, and secured to Etta M. Klein the possession and enjoyment of the property contemplated by the statute. The acquisition by the wife of the full benefits of ownership of interest which remained in the decedent became complete only upon his death. It was, therefore, a transfer at his death. Saltonstall v. Saltonstall, 276 U. S. 260; Chase National Bank v. United States, 278 U. S. 327; Reinecke v. Northern Trust Co., 278 U. S. 339; McCaughan v. Girard Trust Co., 11 Fed. (2d) 529; Dean v. Willcutts, 32 Fed. (2d) 374. We are of opinion, therefore, that the decedent had an interest in the property which was the subject of the instrument creating a life estate in his wife, the transfer of

which interest took effect and was complete at his death, and that the value of this interest was a proper item to be included in the gross estate.

Relying upon Nichols v. Coolidge, supra, and the decisions of the United States Board of Tax Appeals in Edward H. Alsop, Executor, 7 B. T. A. 848; James Duggan, Executor, 8 B. T. A. 482; David W. Crews Estate, 8 B. T. A 949; and Edgar M. Morsman, Jr., Administrator, 14 B. T. A. 108, the plaintiffs insist that inasmuch as the instrument in question was executed in July, 1918, the revenue act of 1918 in so far as it undertakes to tax a transfer made before its passage was unconstitutional We think, however, that the decision in Nichols v. Coolidge, supra, goes no further than to hold that where a donor has made a completed gift inter vivos not in contemplation of death and prior to the en- [fol. 16] actment of the act under which the tax is sought to be exacted and where by such transfer he has divested himself of all further control or any other disposition of the property than that provided in the instrument of transfer, any attempt to tax such a gift merely because the transfer was intended to take effect in possession or enjoyment at or after death is arbitrary, capricious, and amounts to confiscation. In such cases there would be no transfer by death, but the property would pass under the provisions of the deed of gift or trust.

In that case Mrs. Coolidge and her husband had executed an instrument in 1907 in which they conveyed property in trust, the income to be paid to them during the life of either of them with remainders over to their sons. Later, in 1917, four years prior to the death of either of them, they assigned all their interest in the income and in the fund itself to their sons, the remaindermen. No claim was made that the gift inter vivos, thus completed, was made in contemplation of death and as they had divested themseles of every interest in the property, the value of the property transferred by Mrs. Coolidge was held to have been improperly included in her gross estate. In so holding the court said:

"The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire

good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?

* * * * * * *

"* * * And we must conclude that section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation."

The language quoted is very broad but we think in view of subsequent decisions of the court its application to "property transferred" refers to completed transfers of property where no interest of value is transferred by death. The transfer there involved, if not complete and beyond control of the donors in 1907, had been completed four years before the death of Mrs. Coolidge. She had divested herself of every interest in the property at that time and neither possession nor enjoyment was postponed until her death. This view finds support in subsequent decisions of the court in Chase National Bank v. United States, supra, and Reinecke v. Northern Trust Co., supra; in the latter case. the court in referring to two trusts created in 1903 and 1910, respectively, and distinguishing the Coolidge case, at page 345, said:

"As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of Nichols v. Coolidge, 274 U. S. 531. In that case it was held that the provisions of the similar section 402 of the 1918 act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with [fol. 17] the fifth amendment of the Federal Constitution and void, as respects transfers completed before any such statute was enacted. But in Chase National Bank v. United States, decided this day, ante, p. 327, the decision is rested on the ground, earlier suggested with respect to the fourteenth amendment in Saltonstall v. Saltonstall,

276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in Chase National Bank v. United States, supra, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed."

At pages 346-348, the court in connection with certain trusts created in 1919 which were held not to be taxable as a part of the estate pointed out that the reserved powers of management did not save to decedent any control over the economic benefits or the enjoyment of the property and that the shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made, and said—

"The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession, or enjoyment. In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment, or control of the donor at his death and so taxable as transfers at death under section 401."

In our opinion the same rule as was applied to the trusts created in 1903 and 1910 must be applied where, by the reservation of a remainder or reversion in fee, as in this case, in the grantor or donor until his death, the transfer is not complete; and the act in force at the date of the decedent's death taxing the interest which passes at death is neither retroactive nor unconstitutional. Cf. Cooper v. United States, — U. S. —, decided February 24, 1930, and May et al., Executors, v. Heiner, — U. S. —, decided April 14, 1930. The date of the execution of the trust, or con-

veyance, is not controlling but the important thing is whether under such instruments there remains in the decedent any interest in the property which passes at his death. In this case we think there was such an interest.

Plaintiffs are not entitled to recover and the petition is dismissed. It is so ordered.

Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 18] VI. JUDGMENT

At a Court of Claims held in the city of Washington on 2nd day of June, 1930, judgment was ordered to be entered, as follows:

Judgment is rendered against the plaintiffs for the cost of printing the record herein, the amount thereof to be ascertained by the Clerk and collected by him.

No printing having been done in this case, no costs are taxed.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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F I L
SEP
CHARLES ELM

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, AND ALSO INDIVIDUALLY AMY K. EISENDRATH, BERNICE K. FRIEDLANDER, AND LAWRENCE KLEIN, PETITIONERS,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BENJAMIN B. PETTUS,
Counsel for Petitioner.

EDWARD CLIFFORD,
COLLADAY, CLIFFORD & PETTUS,
Of Counsel.

National Publishing Co., Washington, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

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v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

I.

Opinion of the Court Below

The special findings of fact and conclusion of law of the Court of Claims have not been officially reported but will be found printed at R. 11-13.

II.

Jurisdiction

The jurisdiction of this court is invoked under section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered on June 2, 1930 (R. 19). Application for writ of certiorari was presented on August 26, 1930 (R. 1).

The suit brought in the Court of Claims is for the recovery of estate taxes erroneously and illegally assessed and collected, jurisdiction of which is conferred upon the Court of Claims by section 145 of the Judicial Code and section 3226 of the Revised Statutes.

III.

The Facts

A full statement of the case has been set out in the petition (R. 1-2) and in the interest of brevity is not repeated at this point.

IV.

Statutes Involved

The statutes involved in this case are printed in the petition (R. 2-3) and to avoid repetition counsel begs leave to refer thereto.

V.

Specifications of Errors

1. The Court of Claims erred in holding that the decedent had an interest in the property, the transfer of which interest took effect and was complete at his death.

2. The Court of Claims erred in holding that the Revenue Act of 1918 which was passed subsequent to the transfer was not unconstitutional and retroactive so far as it attempted to tax the transfer here involved.

3. The Court of Claims erred in giving judgment for the respondent.

VI.

THE ARGUMENT

Summary of Argument

A. The deed made by decedent on July 1, 1918, was a completed gift and was not a transfer intended to take effect in possession or enjoyment at or after his death within the meaning of section 402 (c) of the Revenue Act of 1918.

B. Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

Point A

The deed made by decedent on July 1, 1918, was a completed gift and was not a transfer intended to take

effect in possession or enjoyment at or after his death within the meaning of section 402 (c) of the Revenue Act of 1918.

By the deed in this case Solomon Klein conveyed to his wife certain lands "for and during the term of her natural life, and if she shall die prior to the decease of said grantor, then *in that event* she shall by virtue hereof take no greater or other estate in such lands." It was further provided in the deed that "the reversion in fee in and to the same shall *in that event* remain vested in the grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance." (Italics supplied.)

The deed further provided in the succeeding paragraph that "*upon condition* and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee *shall by virtue of this conveyance* take, have and hold the said lands in fee simple." (Italics supplied.)

The decision of the Court of Claims was based upon the theory that decedent had an interest in the property, the transfer of which was complete at his death, and that the value of this interest was included in his gross estate under section 402 (c) of the Revenue Act of 1918.

We submit that the nature of the deed plainly indicates that this was a grant of a determinable fee to the grantee Etta M. Klein. The phrase "if she shall die prior to the decease of said grantor" refers to a condition which might not happen and in fact did not happen. As that event did not happen before the death

of the grantor, the determinable fee was by his death ipso facto enlarged into a fee simple.

Challis Real Property, pp. 197, 200.

Friedman v. Steiner, 107 Ill. 125.

All that remains in the grantor after conveying a determinable fee is the possibility of a reverter.

Brattle Square Church Prop. v. Grant, 3 Gray (Mass.) 142.

Hunter v. Middleton, 13 Ill. 50.

The grantor conveyed the whole estate except a contingent reversion dependent on the grantee failing to survive him. The deed operated as a conveyance of the fee with limitations over, which may terminate the estate granted upon the conditions of the deed.

Stoller v. Doyle, 257 Ill. 369; 110 N. E. 959.

Morton v. Babb, 251 Ill. 488; 96 N. E. 279.

Bowler v. Bowler, 176 Ill. 541; 52 N. E. 437.

Chapin v. Nott, 203 Ill. 341; 67 N. E. 883.

Sterling v. Huntley, 139 Ga. 21; 76 S. E. 325.

Thomas v. Williams, 105 Minn. 88; 17 N. W. 155.

The clause in the habendum providing for a reversion to the husband limits the conveyance to a conditional fee liable to be defeated by the wife's death before the husband.

Fogarty v. Stack, 86 Tenn. 610; 8 S. W. 846.

Case v. Dwire, 60 Iowa 442; 15 N. W. 265.

Being contingent there is no interest in Solomon Klein which ceased or was transferred by his death; and until the contingency happened, the whole title is in the grantee.

North v. Graham, 235 Ill. 178; 85 N. E. 267.

Hart v. Lake, 273 Ill. 60; 112 N. E. 286.

Point B

Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

In *Nichols v. Coolidge*, 274 U. S. 531, 543, this Court with respect to the statute here under consideration held:

> "In so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Saltonstall v. Saltonstall*, 276 U. S. 260, and again in *Chase National Bank v. United States*, 278 U. S. 327, an outstanding power of disposition was reserved exclusively to the transferror for his own benefit and this court held that the non-exercise of that power was as much a disposition of the property testamentary in nature as would be its exercise at death. It was held that the consequent passing to designated beneficiaries of all rights under the property free from the possibility of its exercise is the legitimate subject of a transfer tax.

In the case at bar the reservation of rights could not be transferred except subject to defeasible fee in the grantee.

In *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347, the Court said, speaking of an equivalent provision of the Revenue Act of 1921:

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

In *May v. Heiner*, 281 U. S. 238, 243, it was said:

> "It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

In *Tyler v. Tyler*, 281 U. S. 497, it was held in a case of tenancy by the entireties that the wife's rights were hedged about at all points by the equal rights of her husband.

> "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment * * *. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other." (P. 504.)

There is, however, a salient difference between the interest here under consideration and the rights of the parties in the Tyler case. In the Tyler case each of the parties owned all of the property with equal rights therein, but here the grantor Klein had only a contingent interest in the property which he had theretofore irrevocably transferred, and this contingent interest was prevented from passing by the fact of his death. Thus, the interest possessed by him immediately prior to death was "obliterated by that event;" and nothing of a property interest "passed from him to the living." *May v. Heiner, supra.*

It is therefore respectfully submitted that in so far as section 402 (c) of the Revenue Act of 1918 operates to impose an estate tax upon any part of the transfer made by Solomon Klein to his wife as hereinbefore set forth, the statute is beyond the constitutional power of Congress and the decision of the Court below should therefore be reversed.

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and to that end a writ of certiorari should issue and this Court should review the decision of the Court of Claims and finally reverse it.

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